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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1032.

ROCKTON & RION RAILROAD (RAILWAY),
A CORPORATION,
Petitioner,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

J. M. HEMPHILL,
Counsel for Petitioner.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutory provisions involved	3
Findings of fact by the District Court	10
Conclusions of law	13
Reasons for granting the writ	14
Conclusion	20

Table of Cases Cited

Adams v. *Mills*, 52 Sup. Ct. 589, 286 U. S. 397	15
Atlantic Coast Line v. *Standard Oil*, 275 U. S. 257, 48 Sup. Ct. 107	16
Baltimore and O. W. S. R. Co. v. *Settle*, 260 U. S. 166, 43 Sup. Ct. 28	14
Railroad Commission v. *Worthington*, 225 U. S. 101, 32 Sup. Ct. 653	16
Richardson v. *James Gibbons Co.*, 319 U. S. 44, 63 Sup. Ct. 917	18
Southern Pacific Terminal v. *I. C. C.*, 219 U. S. 498, 31 Sup. Ct. 279	15
Southland Gasoline Co. v. *Bayley*, 319 U. S. 44, 63 Sup. Ct. 917	18
Tap Line Cases, 234 U. S. 1, 34 Sup. Ct. 741	16
Texas & N. O. R. R. v. *Sabine Tram Co.*, 227 U. S. 111, 33 Sup. Ct. 229	15
Union Stockyard and Transit Co. v. *United States*, 308 U. S. 213, 60 Sup. Ct. 193	16
United States v. *Brooklyn Eastern District Terminal*, 249 U. S. 296, 39 Sup. Ct. 283	16,17
United States v. *Erie Railway*, 280 U. S. 98, 50 Sup. Ct. 51	16
United States v. *Union Stockyards*, 226 U. S. 286, 33 Sup. Ct. 83	15

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vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Rockton & Rion Railroad (Railway), a corporation, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit in the above entitled cause, entered on the 11th day of December, 1944, affirming the decision of the District Court.

Opinions Below

The opinion of the District Court (R. 14) is reported in 54 F. Supp. 342. The opinion of the Circuit Court of Appeals (R. 90) is reported in 146 F. (2d) 111.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on December 11, 1944 (R. 91). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 25, 1925 (28 U. S. C. A. 347(a)).

Questions Presented

I

Whether, under the provisions of the Fair Labor Standards Act, 29 U. S. C. A., Sec. 201-219, any of the employees of petitioner, a railroad corporation, chartered as a common carrier under the laws of the State of South Carolina, operated, authorized and permitted by the laws of said state to transport for the public wholly within the State of South Carolina miscellaneous goods and freights, but not only not authorized, but denied by the Interstate Commerce Commission, the right to engage or participate in interstate commerce, are within the coverage of the Act?

II

If the petitioner, a railroad corporation, chartered as a common carrier under the laws of the State of South Carolina, operated, authorized and permitted by the laws of said state to transport for the public wholly within the State of South Carolina, miscellaneous goods and freights, a small portion of which are ultimately destined to be taken by a connecting carrier to points beyond the state, or may have originated and been brought to it from points without the state, be thereby held to be engaged in interstate commerce, are not the provisions of Section 7 of the Fair Labor Standards Act inapplicable to petitioner's employees because employees of an employer subject to the provisions of Chapter I of the Interstate Commerce Act (29 U. S. C. A. Sec.

1-27) because of the express provisions of Section 13(b) of the Fair Labor Standards Act (29 U. S. C. A. 213(b)), as follows:

> "The provisions of Section 207 of this title shall *not apply* with respect to — (2) any employee of an employer subject to the provisions of Sections 1-27 of Title 49."

III

Where it appears that the petitioner has been engaged solely in transporting for the public for hire over its own railroad lines wholly within the State of South Carolina some goods and freights which may be ultimately destined to, or which have originated in other states, was it logical for the lower courts to, on the one hand, agree with the Interstate Commerce Commission in holding that it was not engaged in interstate commerce, and at the same time hold that it was engaged in interstate commerce?

IV

Is it not altogether illogical that the Circuit Court of Appeals for the Fourth Circuit, when applying the same identical facts as to the transportation or carriage performed by petitioner, to hold that it was not engaged in interstate commerce, and then hold that it was engaged in interstate commerce?

Statutory Provisions Involved

The pertinent sections of the Fair Labor Standards Act are:

3(b) [29 U. S. C. A. 203(b)]; 3(i) [29 U. S. C. A. 203(i)]; 3(j) [29 U. S. C. A. 203 (j)]; 6 [29 U. S. C. A. 206]; 7, [29 U. S. C. A. 207]; 13(b), [29 U. S. C. A. 213(b)]; 15(a)(1), [29 U. S. C. A. 215(a)(1)]; and 17, [29 U. S. C. A. 217].

Also pertinent are the provisions of Chapter I of the Interstate Commerce Act [49 U. S. C. A., Sections 1-27, incl.]

The pertinent portions of *Section 3* of the Fair Labor Standards Act are as follows:

> "Section 3. Definitions
> As used in Sections 1-19 of this title—
> (b) 'Commerce' means trade, commerce, transportation, transmission or communication among the several States or from any State to any place outside thereof.
> (i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."
> (j). 'Produced' means produced, manufactured, mined, *handled* or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

The pertinent portions of *Section 6* of the Fair Labor Standards Act are as follows:

> "Section 6. Minimum Wages; Effective Date
> (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—
> (1) during the first year from the effective date of this section, not less than 25 cents an hour,
> (2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8 of this title, which ever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8 of this title."

The pertinent portions of *Section 7* of the Fair Labor Standards Act are as follows:

"Section 7. Maximum Hours

(a) No employer shall, *except as otherwise provided* in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

The pertinent portions of *Section 13(b)* of the Fair Labor Standards Act are as follows:

"Section 13 Exemptions

(b). The provisions of *Section 7* of this title shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has *power* to establish qualifications and maximum hours of service pursuant to the provisions of section *304* of Title 49; or (2) any employee of an *employer* subject to the provisions of sections 1-27 of Title 49."

The pertinent portions of *Section 15 (a)(1)* of the Fair Labor Standards Act are as follows:

"Section 15. Prohibited Acts; Prima Facie Evidence

(a) After the expiration of one hundred and twenty days from the date of enactment of sections 1-17 of this title, it shall be unlawful for any person—

(1) to *transport,* offer for transportation, ship, *deliver,* or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6, or section 7 of this title, or in violation of any regulation or order of the Administrator issued under section 14 of this title; except that *no* provision of this chapter shall impose any liability upon *any common carrier* for the transportation in commerce in the regular course of its business of any goods *not produced* by such common carrier, and no provision of this chapter shall excuse any common carrier from its obligation to accept any goods for transportation;"

The pertinent portions of *Section 17* of the Fair Labor Standards Act are as follows:

"Section 17. Injunction proceedings

The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, as amended (U. S. C., 1934 edition, Title 28, sec. 381), to restrain violations of section 15 of this title. June 25, 1938, c. 676, sections 17, 52 Stat. 1069."

Statement

This action seeking an injunction was not commenced until June 13, 1942. The injunction was sought upon the theory that petitioner had been violating the provisions of Section 6 of the Fair Labor Standards Act (U. S. C. A. 206), failure to pay the minimum wage to some of its employees; of Section 7 of said Act (U. S. C. A. 207), failure to pay time and a half to some of its employees for time worked over the maximum hours; and Section 11 of said Act (U. S. C. A. 211), failure to make, keep and preserve proper records.

All of the testimony showed, in fact it was admitted by plaintiff, that at least four months prior to the commencement of the action (beginning on or before February 12, 1942), the petitioner had been voluntarily paying, and was continuing to pay, to all of its employees at least thirty (30¢) cents, per hour or more, hence was and is in full compliance with Section 6 of the Act, and that for at least four months prior to the commencement of the action, certainly from and after February 12, 1942, petitioner had been making, and was continuing to make, keep and preserve its records exactly in accordance with the regulations and recommendations of the Administrator, hence it was and still is the contention of petitioner that even if it were or be subject to any of the provisions of the Fair Labor Standards Act (U. S. C. A. 201-219), nevertheless, the Administrator, neither at the time of the commencement of the action, nor at the time of the trial, had any right to an injunction by reason of any claim of violation of Section 6 or Section 11 of the Act.

It further clearly appeared that some of the employees of petitioner had been, and still were at the time of the trial, working some hours in excess of the maximum hour provisions (Section 7 of the Act) (U. S. C. A. 207), and that to

such employees as did work some overtime, petitioner was not paying time and a half for overtime, it being the contention of petitioner that, if subject to any of the provisions of said Act, it was certainly not subject to the provisions of Section 7 because it was and is unquestionably an employer subject to the provisions of Sections 1-27 of Title 29, and as such, expressly exempted by the provisions of Section 13(b)(2) of the Act (U. S. C. A. 213(b)(2)).

There was substantially no conflict in the testimony adduced, so that the only real contention between the parties with respect to the testimony arose out of their respective contentions as to what factual conclusions were to be had from the testimony and the application of those facts to the legal issues made by the pleadings.

The complaint as amended, and the answer to the amended complaint are set forth verbatim in the Record (R. 1, 7), from which it appears that the petitioner, in answer to the complaint as above outlined, took three (3) positions.

> (1). That it was not, and never had been, engaged in interstate commerce, its activities being purely intrastate and local;
>
> (2). That if petitioner were or be subject to any of the provisions of the Fair Labor Standards Act, it was not, and is not, subject to the provisions of Section 7 because an employer subject to the provisions of Chapter I, Sections 1-27 of Title 49 U. S. C. A., the Interstate Commerce Act;
>
> (3). That inasmuch as petitioner had been, and was since February 12, 1942, unquestionably in full compliance with the provisions of Sections 6 and 11 of the Act, and was certainly not subject to the provisions of Section 7 of the Act, the Administrator was and is not entitled to any injunction against petitioner.

Counsel for petitioner is confident that but for the fact that the District Court concluded and held petitioner to be

subject to, and in noncompliance with, Section 7 of the Act, the injunction would have been promptly denied by the District Judge in the exercise of his discretion as a chancellor.

The petitioner took practically no exceptions to the findings of fact made and specifically stated in detail by the District Judge, and which appear verbatim in the Record (R. 27). While it is unquestionably true that there was to some extent an intermingling and overlapping of employees of petitioner with some of the employees of those who were consignors and consignees upon and along petitioner's line of railroad, it was respectfully submitted that the District Court erred in concluding, if it did so conclude, that such fact tended to make the petitioner and some of its consignors and consignees one integrated whole. This is particularly true in view of the correct findings of fact by the Courts to the effect that "Defendant (petitioner) owns no stock in the quarry and granite companies along its line and that such quarry and granite companies own no stock in the defendant (petitioner) corporation."

While not clearly appearing in the findings of fact by the Court, the testimony admitted of no other reasonable conclusion but that no one or more of petitioner's employees ever in anywise participated in the physical process of making or producing any of the goods which were shipped over its line of railroad. As a matter of fact, substantially all of the freight hauled by the petitioner was loaded and unloaded by the consignors and consignees located along petitioner's line of railroad; so that the record indicates that petitioner never at any time did any more than haul or transport the goods tendered it by the consignors and consignees.

While not specifically found by the District Court, there is not the slightest doubt about the fact that petitioner was never a consignor of any of the freights hauled by it and

was never a consignee of any freights whatsoever, save only of material and supplies needed in the carrying on of its railroad business, such as coal, rails, crossties, etc.

Findings of Fact by the District Court

In addition to the facts appearing in the foregoing statement, the findings of fact by the District Court pertinent to this petition which were unquestioned before the Circuit Court of Appeals were the following paragraphs set forth in the record (R. 27 *et seq.*), as follows:

> "1. The defendant, Rockton & Rion Railroad is a railroad corporation, created, organized and existing under the laws of the State of South Carolina. On the 24th day of August, 1932, the South Carolina Public Service Commission issued its Certificate and Order certifying in effect: (1) That all the laws relating to the construction of railroads had been complied with, and (2) that the railroad appears to be in a safe condition for operation, and (3) that it has the consent of the Commission to acquire the railroad properties, and (4) that the entire line of railroad (that is, the entire twelve miles) be operated as a common carrier, said railroad being hereby open for public use. Thereafter South Carolina Public Service Commission passed various orders prescribing rates, and regulating the divisions thereof upon various commodities.
>
> 2. The defendant operates as a common carrier for hire, hauling all freights tendered it for transportation by the public generally, charging for such services the rates prescribed by South Carolina Public Service Commission.
>
> 3. The defendant operates a railroad, the main line of which is twelve miles in length, all situate in Fairfield County, South Carolina, between the station known as Anderson Quarry, to Rockton, South Carolina, where its road connects with the Southern Railway by means of a switch connecting defendant's main line to what

is known as the "house track" of the Southern Railway. In addition to its main line, defendant has some eighteen or twenty side tracks or switch tracks located at various points along its main line for use by its patrons in the loading and unloading of freight.

4. Defendant owns four locomotives, and two or three locomotive cranes, two box cars, ten or twelve flat cars, eighteen or twenty dump cars, twelve yard and eight yard dump cars, and two coal cars, and it also procures from the Southern Railway and uses on its line other cars as needed.

16. On April 15, 1932, the defendant applied to the Interstate Commerce Commission under Section 1 (18) of the Interstate Commerce Act for authority to acquire and operate as a common carrier in interstate commerce that portion of the railroad extending from Rockton to Rion. The Commission denied the application, finding that public convenience and necessity were not shown to require the acquisition and operation by the defendant of the line from Rockton to Rion (189 I. C. C. 545). The Commission found as a fact that under the plan presented, the granite companies were merely attempting to change the status of the line from a plant facility to a common carrier. The Commission rejected the applicant's contention that it was not industrially controlled, finding as a fact that the same individuals who would own all of the applicant's capital stock also owned an interest in the stone companies which proposed to use the line. Despite the denial of its certificate, the railroad completed its incorporation, acquired the road, and henceforth proceeded to operate it under the authority of its State charter as an intrastate common carrier (Docket No. 1283, Order No. 891, August 24, 1932, of Railway Commission of South Carolina, now Public Service Commission of South Carolina), hauling all freight tendered it for transportation by the public, charging the rates prescribed by the South Carolina Public Service Commission.

19. The defendant is engaged in transporting over its line a large volume of shipments destined for points

outside the State of South Carolina, practically all such shipments being made by granite companies located on defendant's line. During the period covered by the complaint, such shipments have averaged in number in excess of two hundred a month. Although the less than carload shipments have predominated, yet measured in terms of carload shipments, the total monthly average has ranged from approximately thirty-five to approximately one hundred carloads. During the same period of time the intrastate shipments (all carload lots) have averaged approximately three hundred and fifty a month. On a weight and tonnage basis, defendant's superintendent testified that the interstate shipments accounted for only about ten per cent of the total traffic. When measured either on the basis of the number of shipments or of tonnage hauled, the defendant is substantially engaged in transporting goods destined to out-of-state points, since on either basis large volumes of goods transported by the defendant are ultimately carried to out-of-state points.

20. The defendant is also engaged in transporting over its line a substantial number of shipments which have originated at out-of-state points. All of such shipments are consigned to the granite companies located upon the defendant's line at Rion and at Anderson Quarry. The defendant also frequently handles incoming express shipments as freight which have originated at out-of-state points. These also are all consigned to the granite companies.

21. The defendant maintains distinctions in its methods for the handling of interstate and intrastate shipments, particularly in shipping documents, billing methods, arrangements for maintaining and participating in joint rates, divisions of rates, etc. On intrastate shipments the defendant's forms are used in the preparation of the bills of lading and other shipping documents, and they cover the entire carriage from the point of origin on the Rockton & Rion line to the point of destination. Similarly, the freight bill which the defendant prepares covers the freight charges for the

entire haul based on the tariffs filed by it with the South Carolina Public Service Commission, and the defendant participates with connecting carriers in divisions of such rates on intrastate shipments. However, on interstate shipments the shipping documents are prepared on forms of the Southern Railway Company to show Rockton as the point of origin, and the bills of lading are issued to shippers by the Southern at Rockton. The defendant does not have with the Southern Railway any arrangements or agreement for maintaining or participating in joint rates on such shipments, and is not accorded any division of rates by the Southern.

22. The defendant preserves the same distinctions in its handling of incoming interstate and intrastate shipments. Although intrastate shipments are transported by continuous carriage to the consignee at its location on the defendant's line, all interstate shipments, regardless of the consignee's location, indicate Rockton as the point of destination. Many of such shipments are in less than carload lots, and upon arrival at Rockton they are unloaded from the cars by employees of the Southern Railway. The Southern agent thereupon calls on the telephone the consignee itself to inform it of the arrival of the shipment from the out-of-state point. Where the consignee wishes the goods hauled by the defendant, it notifies the railroad, and the goods are thereupon re-loaded at Rockton into defendant's cars (if in less than carload lots) and transported by defendant to the consignee. The defendant handles and transports incoming interstate express shipments in the same manner as freight, treating them and charging the consignee for them as freight for the transportation from Rockton to the consignee's plant along its line."

Conclusions of Law

Notwithstanding the existence of the foregoing facts, the District Court made the following conclusions of law which

were approved and adopted by the Circuit Court of Appeals, as follows:

> "1. The employees of the defendant are engaged in commerce and in the production of goods for commerce, within the meaning of the Act.
>
> 2. As to interstate shipments, the defendant is a plant facility of the granite industries along its line.
>
> 3. The defendant, as to interstate shipments, is not furnishing services of transportation within the meaning of Part I of the Interstate Commerce Act.
>
> 4. The defendant does not come within the exemption provided in Section 13(b)(2) of the Act.
>
> 5. The defendant has violated and is now violating some of the provisions of the Act, and the plaintiff is entitled to injunctive relief."

Reasons for Granting the Writ

A. The decision by the Circuit Court of Appeals (by its concurrence in the findings of the District Court), to the effect that under the foregoing facts petitioner was not an employer of employees subject to Chapter I of the Interstate Commerce Act, is in conflict with and contrary to a long line of decisions of this Court, including among others the following:

> The case of *Baltimore and O. W. S. R. Co.* v. *Settle et al.*, 260 U. S. 166; 43 S. Ct. 28, is, from a factual standpoint, directly in point. In that case the shipper, Settle, had the freight shipments split into two shipments, one interstate and one intrastate. There the question presented was whether in view of the undisputed facts, the original and continuing intention on the part of the shipper to reship made the reshipment, as a matter of law, part of a through interstate movement. The Court held:
>
> "Under these circumstances, the intention as it was carried out, determined, as a matter of law, the

essential nature of the movement, and hence, that the movement through to Madisonville was an interstate shipment; for neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk is an essential of a through interstate shipment. These are common incidents of a through shipment and when the intention with which a shipment was made is an issue, the presence or absence of one or all of these incidents may be important evidence bearing upon that question. But where it is admitted that the shipment made to the ultimate destination had at all times been intended, these incidents are without legal significance, as bearing on the character of the traffic."

To the same effect is the case of *Texas & N. O. R. R.* v. *Sabine Tram Company*, 227 U. S. 111, 33 S .Ct. 229, where there was an intrastate shipment which was complete in itself and which was unloaded and then picked up and started all over again, the Court saying:

"The shipments having the character of foreign commerce, when they passed out through the port of Sabine, when did they acquire it. We have had occasion to express at what point of time a shipment of goods may be ascribed to interstate or foreign commerce and *decided* it to be when the goods have actually started for their destination in other states or to a foreign country, or delivered to a carrier for transportation."

"The determining circumstances is that the shipment of lumber to Sabine was but a step in its transportation to its real and ultimate destination. In other words, the essential character of the commerce, not its mere accidence, should determine.

"That it is the nature of the traffic and not its accidence, would determine its character is illustrated by R. R. Commission vs. Worthington."

To the same effect are the holdings in *U. S.* v. *Union Stockyards*, 226 U. S. 286, 33 S. Ct. 83; *Adams* v. *Mills*, 52 S. Ct. 589, 286 U. S. 397; *Southern Pacific Terminal*

v. *I. C. C.*, 219 U. S. 498; 31 S. Ct. 279; *Tap Line Cases*, 234 U. S. 1, 25; 34 S. Ct. 741; *U. S.* v. *Brooklyn Eastern District Terminal*, 249 U. S. 296; 39 S. Ct. 283; *Atlantic Coast Line* v. *Standard Oil*, 275 U. S. 257; 48 S. Ct. 107 (S. Ct. p. 1110); *Railroad Commission* v. *Worthington*, 225 U. S. 101, 32 S. Ct. 653; *U. S.* v. *Erie Railway*, 280 U. S. 98, 50 S. Ct. 51.

Finally, if there could be any lingering doubt that a corporation, even though not a common carrier, which either starts a shipment ultimately destined for an interstate journey, or for that matter, does nothing more than unload and deliver a shipment which had arrived by interstate commerce, is subject to the provisions of the Interstate Commerce Act, and the authority and jurisdiction of the Interstate Commerce Commission, it is to be found in the clear-cut decision of the Court in *Union Stockyard and Transit Company* v. *the United States*, 308 U. S. 213, 60 S. Ct. 193, where all of the cases of similar nature and holding are reviewed and affirmed.

Since, from the facts adduced, it appears that as some of the shipments ultimately and intentionally destined by the shipper for points beyond the State of South Carolina are picked up and hauled by the petitioner as a railroad common carrier from points on its line to Rockton, and likewise that petitioner picks up at Rockton and hauls to destination on its own line freights from points without the state intentionally and continuously intended by both consignee and consignor to be delivered to points along petitioner's line, there cannot be the slightest doubt but that petitioner is subject to at least one or more of the provisions of the Interstate Commerce Act (29 U. S. C. A. Sections 1-27), and as such, absolutely exempt from the requirements that it pay wages at rates of one and a half times the regular rate for hours worked over the maximum in said Section 207 provided, regardless of whether it be held to be in interstate or intrastate commerce within the meaning of the Fair Labor Standards Act.

Not only is petitioner subject to the provisions of the Interstate Commerce Act as hereinabove shown, but it likewise appears that it is subject to the federal Hours of Service Act, which prohibits any common carrier by railroad engaged in interstate commerce from requiring or permitting an employee to remain on duty for a longer period of certain hours therein set forth. In this connection we think that the cases of *U. S.* v. *Brooklyn Eastern District Terminal*, 249 U. S. 296; 39 S. Ct. 283, is peculiarly significant, because the facts of that case appear to be substantially the same as those established to exist with respect to the petitioner in the case at bar. It was there held:

> "The services rendered by the terminal are public in their nature and of a kind ordinarily performed by a common carrier."

Here the services rendered by the petitioner are of a public nature and are, in fact, those performed by a common carrier. In said case it was also held:

> "The evil sought to be remedied exists equally, whether the Terminal's operations are conducted by the railroad companies themselves or by the Terminal as the agent; and whether the Termiaal acts only as such agent for railroads or undertakes *in addition to transport on its own accord goods for shippers.*"

> "The fact that the railroad of the Terminal is short does not prevent it from being a common carrier; *United States vs. Sioux City Stockyards Company* (C. C.), 162 Fed. 556; nor does the fact that the thing which it undertakes to carry is contained only in cars furnished by the railroad companies with which it has contracts. Railroads, whose only service is hauling cars for other railroads, have been held liable as common carriers under the Safety Appliance Acts — numerous quotations".
>
> "What the Terminal contracts to transport, however, is not primarily cars, but their contents."

From the cases of *Southland Gasoline Company* v. *Bayley et al.*, and *Richardson* v. *James Gibbons Company*, 319 U. S. 44, 63 S. Ct. 917 (the latter being an affirmation of a decision by the Circuit Court of Appeals of the Fourth Circuit), it clearly appears that if petitioner be, as it is, subject to the Interstate Commerce Act and to the authority of the Interstate Commerce Commission, it is exempt from the provisions of Section 7 of the Fair Labor Standards Act (29 U. S. C. A. 207), notwithstanding that the Interstate Commerce Commission may not have seen fit to exercise its authority or make regulations with respect to petitioner. In the same case the Supreme Court said:

> "Furthermore, it was said on the Senate floor that the amendment as to motor operators was to give them the exemption from the Fair Labor Standards Act enjoyed by the *railway employers* under the Hours of Service Act."

B. The question involved in this case is one of federal law, which has not been, but should be, settled by this Court. It is a matter of common knowledge that there are throughout the Nation hundreds or even thousands of short line railroads transporting goods and freight for hire for the public generally who never, in fact, carry any such goods or freights outside the State in which each is located, but each of whom does carry for delivery to or receive from a connecting carrier goods and freights which such connecting carrier will either carry to, or has received from, points beyond the limits of such State. It is of vital importance, not only to each and all of such short line railroads, but likewise to all of the employees thereof, to have it determined for once and all by this Court whether such short line railroads are engaged in interstate commerce, or are not engaged in interstate commerce. If no one of such short line railroads be engaged in interstate commerce, it, of course, follows that no one of them is in anywise subject to the pro-

visions of the Fair Labor Standards Act. If it is to be consistently held that each such short line railroad is engaged in interstate commerce, it should then be determined by this Court whether or not each such short line railroad is an employer of employees subject to Chapter I of the Interstate Commerce Act. And this particularly for the reason that each such short line railroad and the employees of each should know whether it or they are subject to the provisions of Section 7 of the Fair Labor Standards Act. If each such short line railroad is subject to Chapter I of the Interstate Commerce Act, the maximum hours provision, Section 7, do not apply because of the express provisions of Section 13(b)(2) of the Fair Labor Standards Act quoted above, but the maximum hours will be fixed by the Interstate Commerce Commission. If the provisions of Section 7 of the Fair Labor Standards Act do apply, then the maximum hours for employees will be fixed by said section of the Fair Labor Standards Act, and not by the Interstate Commerce Commission. Until there is a clear-cut determination and decision by this Court no such employer knows whether or not he is required to pay time and a half, for time worked in excess of the maximum provisions of Section 7 of the Fair Labor Standards Act, nor does any employee of such an employer known whether or not he is entitled to receive time and a half for any and all hours worked by him in excess of the provisions made by Section 7 of the Fair Labor Standards Act.

C. There have been many decisions by the Circuit Courts of Appeal and by this Court defining the term "interstate commerce" or "engaged in interstate commerce," many of which are in apparent conflict. It appears that the Circuit Court of Appeal for the Fourth Circuit had before it a given state of facts, from which it, on the one hand, held petitioner to be engaged in interstate commerce, and, on

the other hand, held that it was not engaged in interstate commerce, the latter holding directly contrary to a long line of decisions, some of which are cited and quoted from in Reason A above.

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted and that the case be expedited in this Court.

J. M. Hemphill,
Chester, S. C.
Attorney of Record for Petitioner, Rockton & Rion Railway.

March 7, 1945.

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Argument	8
Conclusion	11

CITATIONS

Cases:	
Baltimore & Ohio S. W. R. R. Co. v. *Settle*, 260 U. S. 166	8
Hughes Bros. Co. v. *Minnesota*, 272 U. S. 469	8
Illinois Central R. R. Co. v. *Interstate Commerce Comm.*, 206 U. S. 441	10
Interstate Commerce Commission v. *Bellaire, Z. & C. Ry. Co.*, 77 Fed. 942	10
Kirschbaum Co. v. *Walling*, 316 U. S. 517	9
Philadelphia & Reading Ry. Co. v. *Hancock*, 253 U. S. 284	8
Rochester Telephone Corp. v. *United States*, 307 U. S. 125	10
United States v. *American Tin Plate Co.*, 301 U. S. 402	10
United States v. *Erie R. R. Co.*, 280 U. S. 98	8
Walling v. *Jacksonville Paper Co.*, 317 U. S. 564	8
Walton v. *Southern Package Corp.*, 320 U. S. 540	9
Western Union v. *Lenroot*, No. 49, decided January 8, 1945	9
Statutes:	
Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201, *et seq.*:	
Sec. 3	2, 9
Sec. 6	3
Sec. 7	3
Sec. 11	3
Sec. 13	3, 9
Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1	9, 10

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1032

ROCKTON AND RION RAILWAY, PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 14–27) is reported in 54 F. Supp. 342. The opinion of the circuit court of appeals (R. 90–91) is reported in 146 F. 2d 111.

JURISDICTION

The judgment of the circuit court of appeals was entered on December 11, 1944 (R. 91). The petition for a writ of certiorari was filed on March 10, 1945. The jurisdiction of this Court is in-

voked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether petitioner's employees are "engaged in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

2. Whether petitioner is "an employer subject to the provisions of Part I of the Interstate Commerce Act" so that its employees are exempt from the overtime provisions of the Fair Labor Standards Act under Section 13 (b) (2).

STATUTES INVOLVED

The statutory provisions involved are Sections 3 (b) and (j) and 13 (b) (2) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201, *et seq.*, which read, in part, as follows:

> Sec. 3. As used in this Act—
>
> * * * * *
>
> (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.
>
> * * * * *
>
> (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall

be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

Sec. 13.

* * * * *

(b) The provisions of section 7 shall not apply with respect to * * * (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

Also relevant are some of the provisions of the Interstate Commerce Act which are set out at R. 79–87.

STATEMENT

This suit was brought by the Administrator of the Wage and Hour Division to enjoin the petitioner from violating the minimum wage, maximum hour and record-keeping provisions of the Fair Labor Standards Act (Sections 6, 7, and 11). The facts as found by the district court (R. 27–38) are as follows:

Petitioner is a railway company organized in 1932 and existing under the laws of the State of South Carolina (R. 27). It operates a railroad in Fairfield County, South Carolina, between Anderson's Quarry and Rockton, a distance of approximately twelve miles (R. 28). At Rockton,

the railroad connects with the Southern Railway (R. 28). Petitioner utilizes the services of approximately thirty-two employees in the operation of its railroad; these include engineers, firemen, flagmen, section hands, construction crews, and clerical employees (R. 28–29).

Petitioner's railroad is operated for the purpose of serving the stone and granite industry along its tracks. From 1907, when the railroad was built, to 1932, it was owned and operated by the Winnsboro Granite Corporation (R. 29–34). Thereafter, the railroad has not only been largely owned or officered in common with the quarries and processing plants on its line (R. 29–34), but it also shares offices and equipment, including telephones, with the stone and granite interests (R. 33), performs work gratuitously for them (R. 33) and is operated to some extent by their employees (R. 19).

On April 15, ~~1948~~ 1932, the petitioner applied to the Interstate Commerce Commission, under Section 1 (18) of the Interstate Commerce Act, for authority to acquire and operate as a common carrier in interstate commerce that portion of the railroad extending from Rockton to Rion (R. 34).[1] The Commission denied the application, finding that "the present and future public convenience

[1] The major portion of the line, that from Rion to Anderson's Quarry, was not included in petitioner's application (R. 58).

and necessity are not shown to require the acquisition and operation by the Rockton and Rion Railway of the line of railroad described" (R. 62, 34; 189 I. C. C. 545). The Commission found that the railroad was a plant facility of the granite companies which, under the plan presented to the Commission, were merely attempting to change the legal status of the line from a plant facility to a common carrier (*ibid.*).

Petitioner nevertheless purchased the road and, following the denial of the certificate, operated it under a state charter as an intrastate common carrier (R. 34). In 1939, competitors of the quarry and granite companies served by petitioner instituted proceedings before the Interstate Commerce Commission against the Rockton & Rion Railway, the Southern Railway, and other connecting lines, alleging that the Rockton & Rion Railway was "unlawfully engaged in interstate commerce" and that, by reason of divisions accorded the Rockton & Rion Railway,[2] shippers along its line were unduly preferred to the prejudice of the complainants (R. 66, 35). The Commission was asked "to prescribe lawful rates for the future and to require defendants to cease and desist from transporting commodities in inter-

[2] Petitioner participates with connecting carriers in divisions of rates on intrastate commerce (R. 37). Section 13 of the Interstate Commerce Act confers on the Commission power to review intrastate rates, fixed by state commissions, to determine whether the intrastate rates result in unjust discrimination against interstate commerce (R. 68, 87).

state commerce" (*ibid.*). In its answer to the complaint, petitioner stated that it "specifically denies that it is operating without authority or is operating in Interstate commerce, *and upon information and belief specifically denies that it is subject to the provisions of the Interstate Commerce Act*" (R. 64).

The Commission, after formal hearing, again found that the operations of the Rockton & Rion Railway, so far as interstate commerce was concerned, was that of a plant facility of the shippers on its line (R. 69, 35). It dismissed the complaint, finding that petitioner was not shown "to be engaged in unauthorized interstate common-carrier operation" (R. 71, 35) and that its participation in joint rates and divisions on intrastate shipments as authorized by the Public Service Commission of South Carolina had not been shown to be in violation of Section 13 of the Interstate Commerce Act (R. 72, 35–36; 243 I. C. C. 105).

The petitioner is engaged in transporting over its line a large volume of shipments destined for points outside South Carolina, practically all such shipments being made by granite companies. When measured either on the basis of the number of shipments or of tonnage hauled, it is substantially engaged in transporting goods destined to out-of-state points, since on either basis a large volume of the goods transported by the petitioner is ultimately carried to out-of-state points (R. 36).

Petitioner is also engaged in transporting substantial shipments which have originated at out-of-state points. All such shipments are consigned to the granite companies located upon petitioner's line at Rion and at Anderson's Quarry. Petitioner also frequently handles incoming express shipments which have originated at out-of-state points as freight. These also are all consigned to the granite companies. (R. 36–37).

From November 2, 1939, to February 12, 1942, the petitioner did not pay some of its employees the minimum wages and overtime pay prescribed by the provisions of the Fair Labor Standards Act, and during that time failed to keep records of the hours worked each day and each week as to some of its employees, and of the hourly rate at which some of its employees were employed. From February 12, 1942, continuously to the date of the trial, petitioner employed some of its employees for work weeks in excess of the hours provided in the Act, and failed to compensate them for such overtime work at rates of not less than one and one-half times their regular rates of pay.

Concluding that the employees of the petitioner are engaged in commerce, and in the production of goods for commerce and that the petitioner, as to interstate shipments, is not furnishing services or transportation within the meaning of Part I of the Interstate Commerce Act, the district court

granted an injunction as prayed (R. 39–41). The Circuit Court of Appeals for the Fourth Circuit, in a *per curiam* opinion, affirmed (R. 90–91).

ARGUMENT

1. Both lower courts correctly held that petitioner's employees meet both of the alternative tests for determining the Act's coverage: (1) they are engaged in interstate commerce within the meaning of Section 3 (b) of the Act and (2) they are engaged in the production of goods for such commerce as defined in Section 3 (j) of the Act. Either of those two grounds is, of course, sufficient to bring petitioner's employees within the scope of the statute.

The admitted activities of these employees in moving incoming and outgoing interstate shipments on one stage of their interstate journey have been considered typical examples of interstate commerce under this and other statutes. See *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564; *Philadelphia & Reading Ry. Co.* v. *Hancock*, 253 U. S. 284; *Hughes Bros. Co.* v. *Minnesota*, 272 U. S. 469; *Baltimore & Ohio S. W. R. R. Co.* v. *Settle*, 260 U. S. 166; *United States* v. *Erie R. R. Co.*, 280 U. S. 98.

Petitioner's employees are also engaged in the "production of goods for commerce" within the meaning of the Act. Their work in the operation of a plant facility for transporting goods in the

course of and in connection with their production by the stone and granite companies constitutes both "transporting" and a "process or occupation necessary to the production" of goods for commerce within the express terms of Section 3 (j) of the Act. *Kirschbaum Co.* v. *Walling*, 316 U. S. 517; *Walton* v. *Southern Package Corp.*, 320 U. S. 540; cf. *Western Union* v. *Lenroot*, No. 49, decided January 8, 1945.

2. Petitioner, although engaged in interstate commerce, is not "an employer subject to the provisions of Part I of the Interstate Commerce Act" within the meaning of the Section 13 (b) (2) exemption. Part I of the Interstate Commerce Act applies only to carriers who not only engage in interstate transportation but do so as "common carriers." Section 1, pars. 1 and 2, 24 Stat. 379, as amended, 49 U. S. C. 1 (1) and (2). Accordingly Part I does not apply to a person engaging in interstate transportation *otherwise than as a common carrier* nor to one engaging in *intrastate* transportation as a common carrier.[3]

The courts below correctly held that petitioner, in its interstate operations, is a plant facility of the stone and granite companies and not a common carrier (R. 39, 91). This conclusion is based on the two prior determinations by the Interstate

[3] Petitioner operates under a state charter as an intrastate common carrier (R. 34), but in its interstate operations it is simply a plant facility, as pointed out more fully in the text.

Commerce Commission as well as on the independent findings of fact of the district court in this case. The weight accorded the Commission's decisions by the courts below was entirely appropriate, for determinations of this kind involve complicated and technical questions, peculiarly within the province of "a tribunal appointed by law and informed by experience." *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 138. See also *Illinois Central R. R. Co.* v. *Interstate Commerce Comm.*, 206 U. S. 441, 454; *United States* v. *American Tin Plate Co.*, 301 U. S. 402.

Petitioner's contention, moreover, cannot be reconciled with its consistent course of conduct. Petitioner does not operate under a certificate of public convenience and necessity which interstate common carriers must obtain under Section 1 (18) of the Interstate Commerce Act. It does not comply with the various other requirements of that Act. It has denied, in a formal proceeding before the Commission, that it is subject to that Act, and it has taken particular pains to treat its interstate and intrastate transactions separately.[4] In short, while maintaining before the Interstate Commerce Commission that it is not subject to Part I of the Interstate Commerce Act, petitioner claims to be subject to it for the purpose of ob-

[4] R. 37–38; cf. *Interstate Commerce Commission* v. *Bellaire, Z. & C. Ry. Co.*, 77 Fed. 942 (C. C. S. D. Ohio).

taining an exemption from the overtime provisions of the Fair Labor Standards Act.

CONCLUSION

The decision below is correct. There is no conflict. We do not believe further review is required and accordingly we oppose the issuance of the writ.

Respectfully submitted.

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APRIL 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945